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Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01-(IM)(NCVC)-252 OF 2011
RAMLY ALI, JEFFREY TAN AND ZAHARAH IBRAHIM JJCA
26 JULY 2011

C

Civil Procedure — Government proceedings — Proceedings against government — Claim against federal government and police for wrongful arrest and detention — Whether individual arresting officers must be named as parties — Whether sufficient to merely name the officer who ordered the arrest — Government Proceedings Act 1956 ss 5 & 6

D

Civil Procedure — Striking out — Application for — Application to strike out plaintiff's claim — Claim against federal government and police for wrongful arrest and detention — Failure to name individual arresting officers as parties — Whether claim on the face of it 'obviously unsustainable' — Whether factual issues existed to be determined at a trial — Whether appropriate case to be summarily struck out — Rules of the High Court 1980 O 18 r 19(1)(a) & (b)

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F

Tort — Breach of statutory duty — Proceedings against government — Liability in tort — Claim against federal government and police for wrongful arrest and detention — Whether individual arresting officers must be named as parties — Whether sufficient to merely name the officer who ordered the arrest — Government Proceedings Act 1956 ss 5 & 6

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The appellants were amongst a group of people who had participated in a peaceful walk in conjunction with the International Human Rights Day. During the event, the participants, including the appellants were ordered to disperse by the commanding officer of the police personals at the scene ie the first respondent. The appellants however disregarded the order to disperse. The

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first respondent then ordered and caused the arrests of the appellants. The appellants were physically arrested by different arresting officers upon the orders and instructions of the first respondent. The appellants were charged at the sessions court but were later acquitted and discharged. The appellants thus filed the present action against the respondents claiming wrongful arrest,

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wrongful detention and malicious prosecution. The respondents applied to strike out the writ of summons and statement of claim pursuant to O 18 r 19(1)(a) and (b) of the Rules of the High Court 1980. The learned judicial commissioner allowed the respondents' application on the sole ground that the appellants had failed to cite the arresting officers who were the tortfeasors

responsible for the alleged arrest as parties to the action, as required under ss 5 and 6 of the Government Proceedings Act 1956. The learned JC held that the tortfeasors were the arresting officers and not the first respondent. Hence the present appeal.

Held, allowing the appeal with costs:

(1) The test for striking out as laid down by the Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously' ie the degree of unsustainability must appear on the face of the claim without having to go into lengthy and mature consideration in detail. If one has to go into a lengthy and mature consideration in detail of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at trial (see para 16).

(2) The first respondent may be the correct tortfeasor in this case. The oral orders and instructions given by the first respondent to arrest were sufficient to constitute arrest or to make him as the officer who was responsible for the alleged tortuous act (ie the arrest) as found in the Federal Court's decision in *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1. The individual arresting officers were merely carrying out the orders and instructions of the first respondent and could not disobey the orders and instructions under s 20(1) of the Police Act 1967 (see para 21).

(3) There were issues of law that needed to be elaborated and argued in great detail and for mature consideration. There were also issues of fact for the trial court to scrutinise and determine how and what manner the orders and instructions were made by the first respondent; under what circumstances and in what manner the arrests were affected by the individual arresting officers on all the appellants. It was also for the trial court to scrutinise the evidence to determine whether the first respondent had 'cause to arrest, and if the cause was 'reasonable'. These were factual issues relevant to determine whether the arrests were wrongful or not. Clearly, these issues could not be summarily disposed of by way of affidavits in a striking out application. This was not an appropriate case to be summarily struck out under O 18 r 19 of the RHC (see para 23).

(4) The learned JC had also failed to consider the malicious prosecution claim by the appellants. It was another cause of action by the appellants as appeared in the statement of claim, where if the appellants succeeded, damages would have ensued. It was a question for trial on evidence whether the appellants were able to prove their case (see para 26).

[Bahasa Malaysia summary

Perayu-perayu adalah antara daripada satu kumpulan yang telah menyertai demonstrasi aman berhubung dengan Hari Hak-Hak Manusia Antarabangsa. Semasa peristiwa tersebut, peserta-peserta termasuk perayu-perayu telah diarahkan untuk bersurai oleh pegawai pemerintah bagi kakitangan polis di tempat kejadian iaitu responden pertama. Perayu-perayu walau bagaimanapun tidak mengendahkan arahan untuk bersurai tersebut. Responden pertama kemudiannya mengarah dan menyebabkan penangkapan perayu-perayu. Perayu-perayu telah ditahan secara fizikal oleh pegawai tangkapan yang berlainan berdasarkan perintah-perintah dan arahan responden pertama. Perayu-perayu telah dituduh di mahkamah sesyen tetapi kemudiannya dibebaskan dan dilepaskan. Perayu-perayu kemudiannya memfailkan tindakan ini terhadap responden menuntut penangkapan dan penahanan salah dan pendakwaan niat jahat. Responden-responden telah memohon untuk membatalkan saman writ dan penyataan tuntutan menurut A 18 k 19(1)(a) dan (b) Kaedah-Kaedah Mahkamah Tinggi 1980. Pesuruhjaya kehakiman yang bijaksana telah membenarkan permohonan responden-responden semata-mata atas alasan bahawa perayu-perayu telah gagal untuk menyatakan pegawai-pegawai tangkapan yang merupakan pelaku tort yang bertanggungjawab untuk penangkapan yang didakwa sebagai pihak-pihak tindakan, seperti yang diperlukan di bawah ss 5 dan 6 Akta Prosiding Kerajaan 1956. Pesuruhjaya kehakiman yang bijaksana memutuskan bahawa pelaku tort merupakan pegawai-pegawai tangkapan dan bukan responden pertama. Justeru rayuan ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Ujian untuk pembatalan seperti yang dinyatakan oleh Mahkamah Agung dalam kes *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 adalah bahawa tuntutan pada dasarnya hendaklah 'obviously unsustainable'. Penegasan bukanlah pada perkataan 'unsustainable' tetapi juga terhadap perkataan 'obviously' iaitu tahap ketakpengekalan harus wujud pada dasar tuntutan tanpa perlu secara mendalam membuat pertimbangan panjang lebar dan matang. Sekiranya seseorang itu harus secara mendalam membuat pertimbangan secara panjang lebar dan matang tentang isu undang-undang dan/atau fakta, justeru adalah tidak berpatutan bagi perkara tersebut untuk dibatalkan secara ringkas. Ia hendaklah ditentukan semasa perbicaraan (lihat perenggan 16).

(2) Responden pertama mungkin adalah pelaku tort yang betul dalam kes ini. Perintah-perintah dan arahan-arahan lisan yang diberikan oleh responden pertama untuk penangkapan adalah mencukupi untuk membentuk penangkapan atau untuk menjadikannya pegawai yang bertanggungjawab untuk tindakan tort yang didakwa (iaitu penangkapan tersebut) seperti yang didapati oleh keputusan Mahkamah

Persekutuan dalam *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1. Pegawai-pegawai tangkapan secara individu hanyalah sekadar menjalankan perintah-perintah dan arahan-arahan oleh responden pertama dan tidak boleh mengingkar perintah-perintah dan arahan-arahan di bawah s 20(1) Akta Polis 1967 (lihat perenggan 21).

(3) Terdapat isu undang-undang yang perlu dijelaskan dan dihujahkan dengan lebih mendalam dan untuk pertimbangan matang. Terdapat juga isu-isu fakta untuk diteliti dan ditentukan oleh mahkamah perbicaraan tentang bagaimana dan cara apakah perintah-perintah dan arahan-arahan dibuat oleh responden pertama; di bawah keadaan dan dalam cara apakah penangkapan tersebut telah dijejaskan oleh pegawai-pegawai tangkapan secara individu terhadap kesemua perayu-perayu. Adalah juga bagi mahkamah perbicaraan untuk meneliti keterangan untuk menentukan sama ada responden pertama mempunyai 'cause to arrest and if the cause was 'reasonable'. Ini merupakan isu-isu fakta yang relevan untuk menentukan sama ada penangkapan tersebut adalah salah atau tidak. Jelas sekali, isu-isu ini tidak boleh diselesaikan dengan ringkas melalui afidavit di dalam permohonan pembatalan. Ini bukanlah kes yang sesuai untuk dibatalkan secara ringkas di bawah A 18 k 19 KMT (lihat perenggan 23).

(4) PK yang bijaksana juga telah gagal untuk mempertimbangkan tuntutan pendakwaan niat jahat oleh perayu-perayu. Ia merupakan satu lagi kausa tindakan oleh perayu-perayu seperti yang dinyatakan dalam penyataan tuntutan, di mana sekiranya perayu-perayu berjaya, ganti rugi akan diberikan. Ia merupakan persoalan untuk perbicaraan atas keterangan sama ada perayu-perayu dapat membuktikan kes mereka (lihat perenggan 26).]

Notes

For cases on application for striking out, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7478–7481.

For cases on proceedings against government, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3121–3124.

For breach of statutory duty in general, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 22–55.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Jayaraman & Ors v PP [1982] 2 MLJ 306, FC (refd)

Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (refd)

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565, FC (refd)

Megat Halim Megat Omar v PP [2009] 1 CLJ 154, CA (refd)

A *Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219, PC (refd)
Wui Kuang Liang v Government of Malaysia & Anor [2006] 4 MLJ 369 (refd)

Legislation referred to

Government Proceedings Act 1956 ss 5, 6
B Penal Code ss 143, 145
Police Act 1967 ss 20(1), 27(4), (5)(a)
Rules of the High Court 1980 O 18 r 19, O 18 r 19(1), O 18 r 19(1)(a), (b)

Appeal from: Civil Suit No S-21NCVC-53 of 2010 (High Court, Kuala
C Lumpur)

Edmund Bon Tai Soon (Leela J Jesuthason with him) (Faiz & Co) for the appellants.
Azizan Md Arshad (Habibah Haron and Andi Razalijaya with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

D

Ramly Ali J (delivering judgment of the court):

[1] This is an appeal by the appellants against the decision of the learned
E High Court judge dated 6 April 2011, allowing the respondents' application to summarily strike out the appellants' writ of summons and statement of claim pursuant to O 18 r 19(1) of the Rules of the High Court (RHC) 1980 with costs of RM3,000.

F BRIEF FACTS

[2] On 9 December 2007, the appellants were amongst a group of people (including members of the public, lawyers, human rights activists and journalists) who had participated in a peaceful walk along Jalan Tuanku Abdul
G Rahman to Central Market in Kuala Lumpur in conjunction with the International Human Rights Day which falls on 10 December every year.

[3] During the event, the participants, including the appellants were ordered to disperse by the commanding officer of the police personals at the scene ie the
H first respondent, Che Hamzah Che Ismail. The appellants however disregarded the order to disperse. The first respondent then ordered and caused the arrests of the appellants. (There was however an issue that the arrests were made ten minutes before the time allowed to disperse had ended). It was not disputed that all the appellants were physically arrested by different arresting officers
I upon the orders and instructions of the first respondent.

[4] The appellants were detained overnight and charged the following day at the Sessions Court Kuala Lumpur under ss 143 and 145 of the Penal Code and alternatively, under ss 27(5)(a) and 27(4) of the Police Act 1967.

[5] At the close of the prosecution case, the sessions court found that the prosecution had failed to establish a prima facie case and acquitted and discharged all the appellants. The prosecution did not appeal against the said acquittal.

[6] On 8 December 2010, the appellants filed the present action against the respondents, inter alia, for the following causes of action, namely:

(a) wrongful arrest and wrongful detention; and

(b) malicious prosecution.

[7] On 15 March 2011, the respondents filed an application vide summons in chambers to strike out the writ of summons and statement of claim pursuant to O 18 r 19(1)(a) and (b) of the RHC 1980. On 6 April 2011, the learned judicial commissioner (JC) allowed the respondents' application with costs. Hence the present appeal.

[8] The learned JC allowed the respondents application to summarily strike out the appellants action against all the respondents on the sole ground that the appellants had failed to cite the arresting officers who were the tortfeasors responsible for the alleged arrest as parties to the action, as required under ss 5 and 6 of the Government Proceedings Act 1956 ('GPA') and affirmed by the Federal Court in *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663. The learned JC held that the tortfeasors must therefore be the arresting officers, but not the first respondent, who was the commanding officer of the day in question (although the orders and instructions to arrest came from the first respondent).

THE APPELLANTS' CASE

[9] The appellants contended that the requirements under ss 5 and 6 of the GPA and affirmed in the case of *Lay Kee Tee* had been complied with by the appellants in filing the present action, by naming the first respondent who had given the orders and instructions for the arrests, as parties to the action. To the appellants the real tortfeasor in the circumstances of the case was the first respondent and not the arresting officers who were merely acting on his orders and did not exercise their independent judgment.

[10] The appellants further argued that the learned JC had summarily struck out their whole action only on the ground of failure to comply with ss 5 and 6 of the GPA and the Federal Court decision in *Lay Kee Tee*, but had failed to take into account that the appellants' action also included a claim for malicious prosecution against the respondents, as their additional cause of action.

[11] The appellants also complained that the requirements under ss 5 and 6 of the GPA and the decision of the Federal Court in *Lay Kee Tee* are only applicable where the action is against the Government of Malaysia (the fourth respondent in the present case). In the present case, even if the appellants had failed to comply with ss 5 and 6 of the GPA and the decision in *Lay Kee Tee*, the learned JC could only strike out the claim as against the fourth respondent (the Government of Malaysia). The action could still have been proceeded with against the first and second respondents (without the Government of Malaysia as a party).

THE RESPONDENTS' CASE

[12] The respondents argued that the arresting officers, and not the first respondent, were the tortfeasors and since they had not been named as parties, the appellants had failed to comply with the requirements under ss 5 and 6 of the GPA and therefore the claim ought to be struck out.

DECISION OF THE COURT

[13] The principles for striking out pursuant to O 18 r 19 of the RHC 1980 are well settled. In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, the Supreme Court ruled:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clard Ltd*), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG to Duchy of Lancaster v L 7 NW Rly Co*) …

[14] A striking out application is not a trial on affidavits. It is not an application where the parties have to adduce evidence to establish the merits of their case. The court should not conduct a minute examination of the documents and the facts of the case. So long as the claim on the face of it discloses some cause of action or raises some question fit to be tried it should not be struck out. The mere fact the case is weak and not likely to succeed is no ground for the pleadings to be struck out.

[15] A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact that is capable of resolution only after taking viva voce evidence during trial, (see *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (Federal Court)).

[16] The test for striking out as laid down by the Supreme Court in *Bandar Builder*'s case is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously' ie the degree of unsustainability must appear on the face of the claim without having to go into lengthy and mature consideration in detail. If one has to go into a lengthy and mature consideration in detail of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at trial.

[17] In the present case, the respondents contended and the learned JC agreed, that the appellants' writ and statement of claim should be summarily struck out, alleging non-compliance with ss 5 and 6 of the GPA as the appellants had not named the individual arresting officers (who physically executed the arrests) as defendants in the suit.

[18] The appellants on the other hand claimed that the arresting officer was the one who gave the orders and instructions to arrest and he had been named as defendant in the suit; ie the first respondent, and therefore the appellants had complied with the requirement under ss 5 and 6 of the GPA as well as the Federal Court's decision in *Lay Kee Tee*.

[19] The crux of the matter is really — who is the tortfeasor in the present case? Was it the first respondent who ordered and instructed the arrest of the appellants or was it the individual arresting officers who were responsible for effecting the arrests based on the orders and instructions of the first respondent?

[20] In interpreting ss 5 and 6 of the GPA, the Federal Court in *Lay Kee Tee* held:

> On the proper construction of ss 5 and 6 of the Act 359, in any claim in tort against the government, the officer who was responsible for the alleged tortuous act must be made a party and his liability established before the government can be made liable vicariously as principal. It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needs to be established.

[21] The appellants submitted 'the officer who was responsible for the alleged tortuous act' ie the arrests in the present case can be the first respondent who ordered and instructed the arrests to be made on the appellants. In the criminal case notes of evidence at the Sessions Court Kuala Lumpur (where all the appellants were charged, tried and later acquitted and discharged) the first respondent stated categorically that he made the decision to arrest and the arresting officers were carrying out his orders. On this point this court agrees

with the appellants that under the circumstances the first respondent may be the correct tortfeasor in this case. The oral orders and instructions given by the first respondent to arrest were sufficient to constitute arrest or to make him as the officer who was responsible for the alleged tortuous act (ie the arrest) as found in the Federal Court's decision in *Lay Kee Tee* case.

The individual arresting officers merely obeyed and followed the orders and instructions of the first respondent. This was admitted by the first respondent in his evidence before the Sessions Court Kuala Lumpur in the criminal case against the appellants. The individual arresting officers were merely carrying out the orders and instructions of the first respondent and could not disobey the said orders and instructions under s 20(1) of the Police Act 1967, which provides:

> (1) Every police officer shall perform such duties and exercise such powers as are by law imposed or conferred upon a police officer, and shall obey all lawful directions in respect of the execution of his office which he may from time to time receive from his superior officers in the Force.

[22] To support their contention on this point, the appellants cited the decision of the Privy Council in *Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219, where it was held:

> An arrest occurs when a police officer states in terms that he is arresting or when he uses force to restrain the individual concerned. It occurs also when by words or conduct he makes it clear that he will, if necessary, use force to prevent the individual from going where he may want to go.

(*Shaaban* case was adopted with approval in *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306 and *Megat Halim Megat Omar v Public Prosecutor* [2009] 1 CLJ 154).

[23] This court finds that the appellants' contention on this issue is not totally without merit. There are issues of law that need to be elaborated and argued in great detail and for mature consideration. There are also issues of fact for the trial court to scrutinise and determine how and what manner the orders and instructions were made by the first respondent; under what circumstances and in what manner the arrests were affected by the individual arresting officers on all the appellants. It would be also for the trial court to scrutinise the evidence to determine whether the first respondent had 'cause to arrest, and if the cause was 'reasonable' '. These are factual issues relevant to determine whether the arrests were wrongful or not. Clearly, these issues cannot be summarily disposed of by way of affidavits in a striking out application. This is not an appropriate case to be summarily struck out under O 18 r 19 of the RHC.

[24] The above issue on who was responsible for the arrests is relevant only to the claim for wrongful arrests on the appellants. Under ss 5 and 6 of the GPA and the decision in *Lay Kee Tee*, this issue relates to the position of the Government of Malaysia as the fourth defendant in the suit, but the learned JC had struck out the action against all the respondents. The appellants contended that even if the learned JC was to strike out the suit against the third and fourth respondents, as the appellants had not named the tortfeasor as alleged the senior federal counsel for the respondents, the suit could still proceed against the first and second respondents (without the Government of Malaysia as a party). The appellants contended that it was the first respondent who issued orders and instructions to arrest all the appellants and later initiated the prosecution against all of them.

[25] This is another issue that needs to be tried. The appellants' contention on this issue is not totally without merit. It is an issue of law that need elaborate argument and mature consideration.

[26] On reading the grounds of judgment by the learned JC, it is clear that the learned JC had failed to consider the malicious prosecution claim by the appellants in the same suit. It is another cause of action by the appellants as appears in the statement of claim, where if the appellants succeed, damages would ensue. It is a question for trial on evidence whether the appellants are able to prove their case or not.

[27] Paragraph 23, of the statement of claim at pp 44–46 of the appeal records sets out the lengthy particulars of the malicious prosecution claim. The first respondent, whom the appellants claimed to be the main tortfeasor in the malicious prosecution claim, has been named as a party. The appellants contended that it was the first respondent who had initiated the prosecution of the appellants which led to the criminal case against them at the Sessions Court Kuala Lumpur. From the pleadings and submissions of counsel, it is clear that both questions of fact and law arise that cannot be resolved without a trial. Only at trial the appellants may be able to prove that:

(a) the respondents initiated the process of prosecution against the appellants which led to the criminal case in the Sessions Court Kuala Lumpur;

(b) the prosecution terminated in favour of the appellants (ie they were acquitted in the criminal case);

(c) the respondents initiated the prosecution maliciously;

(d) there was no reasonable and probable cause for the prosecution; and

(e) the appellants have suffered damages.

(see *Alkin's Encyclopedia of Court Forms in Civil Proceedings*, (2nd Ed), Vol 25, 1998 Issue, p 400, para 2).

[28] On this issue the court is in agreement with Clement Skinner J (now JCA) in his decision in *Wui Kuang Liang v Government of Malaysia & Anor* [2006] 4 MLJ 369, where the plaintiff's claim in that case was for malicious prosecution. The learned judge held:

> Here, the appellant's cause of action is for malicious prosecution, the success or failure of which action will depend on whether or not it can be shown that the second respondent instituted or earned on the proceedings maliciously or whether there was an absence of reasonable and probable cause for the proceedings, which are questions that give rise to issues of mixed fact and law which are dependent for their resolution on all the circumstances and evidence that are disclosed at a trial. Such questions are not suitable to be decided on disputed facts in the affidavits of the parties, and certainly cannot be decided by merely looking at the pleadings only on an application under the first limb of O 14 r 21(1)(a) of the SCR.

CONCLUSION

[29] Based on the above considerations, this court unanimously is of the view that there are a number of relevant issues that need to be tried and evidence to be adduced at trial for determination of the whole claim by the appellants against the respondents. The pleadings clearly disclose some causes of action or raised some questions fit to be decided by the judge at trial; the mere fact that the case is weak and not likely to succeed at the trial is no ground for the claim to be struck out summarily under O 18 r 19 of the RHC. There are several issues of law that require mature consideration; and there are several issues of fact that are capable of resolution only after taking viva voce evidence. This is obviously not an appropriate case for striking out summarily.

[30] Therefore, the appeal is allowed with costs in the cause. Deposit to be refunded.

Appeal allowed with costs.

Reported by Kanesh Sundrum